No. 11508

In the

United States Circuit Court of Appeals

For the Ninth Circuit

CHESTER FIPPIN and ST. CLAIRE CORPORATION, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Opening Brief of Appellants

Appeal from the District Court of the United States for the District of Nevada

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BOCCARDO & WILLIAMS
Bank of America Building,
San Jose, California.
Attorneys for Appellants.

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The appellants, convicted in the District Court of the United States for the District of Nevada, for violation of the provisions of Veterans' Housing Order No. 1, issued on March 26, 1946, by the Civilian Production Administration, and sentenced to pay fines aggregating the sum of $7,500.00, have duly appealed to this Court upon an assignment of errors and the Clerk's Record of proceedings, without a bill of exceptions, pursuant to the provisions of Rule 8 of the Criminal Appeals Rule.

JURISDICTIONAL STATEMENT.

The statutory provisions which sustain the jurisdiction are as follows:

a. THE JURISDICTION OF THE DISTRICT COURT, Title 28, Section 41, United States Code, which gives the District Courts of the United States jurisdiction "of all crimes and offenses cognizable under the authority of the United States."

b. THE JURISDICTION OF THIS COURT UPON APPEAL TO REVIEW THE JUDGMENT IN QUESTION, Title 28, Section 225, United States Code, which confers jurisdiction on appeal to review final decisions

> "First in the District Courts in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

c. THE RIGHT TO APPEAL AFTER A PLEA OF NOLO CONTENDERE is sustained by the decision in the case of

> *Hocking Valley Railway v. United States*, 210 Fed. 735 at 737.

d. THE PLEADINGS NECESSARY TO SHOW THE EXISTENCE OF JURISDICTION:

The information. (R. 2-5.)

Pleas of nolo contendere. (R. 11.)

e. THE FACTS DISCLOSING THE BASIS OF JURISDICTION are set forth in the ensuing abstract of the case which follows immediately. In order to avoid repetition they will not be stated here.

ABSTRACT OF THE CASE.

The defendants and appellants in this case are Chester Fippin and St. Claire Corporation, a California corporation. James F. Boccardo was also named as a defendant in the information filed but both counts of the information were dismissed as to him. (R. 11.)

The charge against the defendants is stated in an unverified information consisting of two counts. (R. 2-5.)

The information alleges (in both counts) the corporate capacity of the defendant St. Claire Corporation; recites that the President of the United States, under the authority vested in him by virtue of the First and Second War Powers Act and the Constitution, established the Civilian Production Administration and vested in it all the functions, powers and duties of the War Production Board; that the Civilian Production Administration duly and lawfully issued certain orders, pursuant to the powers so vested in it, for the purpose of controlling and conserving materials and facilities for use in the low cost housing program to meet the needs of returning veterans and, in particular, issued Veterans' Housing Program Order 1 (VHP-1), and various amendments thereto. The content of VHP-1 order is recited in general terms and the information charges that this order

> "forbids the beginning of certain types of construction, as defined in the order, after the effective date of the order, March 26, 1946, unless ex-

empted under said order or specifically authorized by the Civilian Production Administration."

The first count of the information charges that defendants, in violation of VHP-1, began the construction of certain commercial buildings in Douglas County, Nevada, at "Tahoe Sky Harbor Casino" which cost $40,405.18, the same being new construction, of a type prohibited by the order and being in excess of the $1,000.00 exemption provided by said order.

The second count charges that defendants, without authorization from the Civilian Production Administration, wilfully did carry on and participate in the construction of the same buildings, being new construction of a type prohibited by said order, and which cost $40,405.18 and approximately $39,405.18 in excess of the $1,000.00 exemption.

The first count of the information was dismissed as to both appealing defendants, (R. 11), and they each entered a separate plea of nolo contendere to the second count of the information. (R. 11). Judgment of conviction was rendered against each of the appealing defendants and a fine of $1,500.00 was imposed on defendant, Chester Fippin, (R.13) and a fine of $6,000.00 was imposed on defendant St. Claire Corporation. (R.15).

Separate appeals were duly taken from each of the judgments of conviction. (R. 28-30).

Pursuant to the terms of Rule 8, Criminal Appeals Rules, the appeals are prosecuted upon an assignment of errors and the Clerk's Record of proceedings without a bill of exceptions. (R. 39-40).

SPECIFICATION OF ASSIGNED ERRORS RELIED ON ON APPEAL.

Assignment of Error No. 1. (R. 40).
Assignment of Error No. 2. (R. 40).
Assignment of Error No. 3. (R. 40).
Assignment of Error No. 4. (R. 40).

ARGUMENT.

1. Summary.

The only point relied upon on appeal is that the information, and particularly the second count thereof on which the appellants were convicted, fails to state facts constituting a crime and that the judgment of conviction rendered thereon is erroneous, for the following reasons:

a. Defendants were convicted on a charge that they violated an order of the Civilian Production Administration issued March 26, 1946, and designated as Veterans' Housing Program Order No. 1, (VHP-1) which purported to prohibit the construction of certain buildings in order to conserve labor and materials for veterans' housing.

This order VHP-1 was issued in excess of the powers of the Civilian Production Administration because the President in his Executive Order creating that administration particularly provided that its powers should be exercised to further "a maximum peacetime production in industry *free from war time controls*,"* and because Congress had theretofore

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* All emphasis appearing in quotations is supplied by the writer.

passed the War Mobilization and Reconversion Act wherein it had specifically directed all executive agencies to

> "permit the expansion, resumption or initiation of production for non-war use whenever such production does not require materials, components or facilities or labor needed for war purposes" etc.

b. VHP-1 order is issued by the Civilian Production Administration in the attempt to exercise war powers and, as charged in the information, under the authority of the First and Second War Powers Act, but the war powers of the Federal government cannot be utilized to control a peace time emergency arising after the cessation of hostilities and any attempt to do so is unconstitutional and void.

c. The information fails to charge any acts against the defendants, or either of them, in violation of VHP-1 order and an analysis of the provisions contained in that order discloses that every charge contained in the information may be true and yet the defendants be innocent of any violation of the order.

d. Congress has enacted the Veterans' Emergency Housing Act of 1946 which covers the whole field attempted to be covered by VHP-1 order and none of the acts charged against the defendants in this proceeding are covered by the criminal penalties provided for in the Veterans' Emergency Housing Act.

REVIEW OF STATUTES APPLICABLE TO THE CASE.

The basis upon which the authority to issue VHP-1 order is attempted to be laid is the Second War Powers Act, 56 Stat. 176, enacted March 27, 1942, (see 50 U. S. C. A. 631 et seq., War Appendix).

Sec. 633 of that act provides: (Sec. 2, (2))

> "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense."

Sec. 633, Sec. 2, (5), makes any violation of the terms of this act a misdemeanor punishable by fine and imprisonment.

The First War Powers Act, 55 Stat. 838, enacted December 18, 1941, (see 50 U. S. C. A., War Appendix, Sec. 601, et seq.), merely gives the President authority to coordinate and redistribute the functions of the various executive agencies, as he may see fit.

Both War Power Acts were enacted under the extraordinary powers which arise in time of war and their constitutionality has been sustained upon this ground.

Next came the War Mobilization and Reconversion Act, 58 Stat. 785, enacted Octiber 3, 1944, (see 50 U. S. C. A., War Appendix, Sec. 1651 et seq.).

Sec. 1658 (b) of that act provides, in part:

> "The executive agencies exercising control over manpower, production, or materials *shall permit* the expansion, resumption, or initiation of production for non-war use whenever such production does not require materials, components, facilities or labor needed for war purposes, or will not otherwise adversely affect or interfere with the production for war purposes."

Executive Order No. 9638 was issued by the President on October 4, 1945, (see 50 U. S. C. A., War Appendix, in appendix thereto p. 71). This order created the Civilian Production Administration and terminated the War Production Board, and transferred the functions of the war board to the Civilian Production Administration. It recites: (Par. 3)

> "The functions and powers transferred by this order shall, to the extent authorized by law, be utilized to further a swift and orderly transition from war time production to *a maximum peacetime production in industry free from war time government controls*, with due regard for the stabiliity of prices and costs; and to that end shall be utilized to: (a) expand the production of materials which are in short supply, (b) limit the manufacture of products for which materials or facilities are insufficient, (c) control the accumulation of inventories so as to avoid speculative hoarding and unbalanced distribution which would curtail total production, (d) grant priority assistance to break bottle-necks which would impede the reconversion process, (e) facilitate the fulfillment of relief and other essential export programs, and (f) allocate scarce materials and facilities necessary for the production of low-priced items essential to the continued success of the stabilization program of the Federal Government."

Thereafter Congress enacted the Veterans' Emer-

gency Housing Act, Public Law 388, of 79th Congress, approved May 22, 1946, (50 U. S. C. A., Sec. 1821-1833, App.). This law deals specifically with the problem of veterans' housing. (See Appendix to to this brief.)

Sec. 1824 contains provisions granting authority to the Housing Expediter, an executive officer, to "allocate or establish priorities for the delivery of" materials and facilities to further public interest and effectuate the purposes of the act. He is directed to give special consideration to satisfying the requirements of the veterans of the second World War.

The provisions of Sec. 1824 of the Veterans' Emergency Housing Act, above mentioned, are the only ones contained in that law which relate to the allocation of materials, etc., or the granting of priorities in favor of veterans or to expedite or facilitate the building of homes for them.

Sec. 1827 (b) of the act makes it a crime to violate any provision of Sec. 1825, or to make a false statement in respect to the matters required to be reported under the provisions of Sec. 1823 of the act. There is no provision in the Veterans' Emergency Housing Act making it a crime to violate the provisions of Sec. 1824, which, as stated above, is the only section regulating or authorizing the control, allocation or granting of priorities in respect to the construction of veterans' housing.

We have made this review of the statutes and orders pertinent to this case in order to show that the

war powers vested in the President by the Second War Powers Act were qualified and controlled by the subsequent enactment of the War Mobilization and Reconversion Act, which contained the directive that industry should be permitted to expand whenever such expansion did not interfere with war production; that the President, in terminating the War Production Board and creating the Civilian Production Administration declared that he did so to "further a swift and orderly transition from war time production to *a maximum peace time production in industry free from war time controls;*" and that the subject matter of the veterans housing program was covered by a statute especially enacted to meet the problem and which did not make any act charged against the defendants in this case a crime.

The conclusion follows that VHP-1 was issued in the attempted exercise of a war time power which the Civilian Production Administration did not possess at the time that order was issued, that it is diametrically opposed to Congressional policy as expressed in law, and that it is void.

Applicable provisions of VHP-1 are printed on pp. 24, 25, 26 of this brief.

THE CIVILIAN PRODUCTION ADMINISTRATION WAS NEVER EMPOWERED TO EXERCISE A WAR POWER OF THE FEDERAL GOVERNMENT.

In time of peace the Federal government has no power, under the Constitution, to exercise general control over the business activities of a private citizen within the confines of one of the sovereign states of the Union. Such control must be justified, if at all on the ground that it is in exercise of a war power.

The foregoing proposition is so fundamental that neither citation of authority nor argument is needed to support it.

Accordingly the VHP-1 order here in question must find its support (1) in an Act of Congress authorizing the exercise of a war time power by the President and, (2) a proper delegation of that power by the President to the Civilian Production Administration.

The United States attorney recognized this rule and, in the information, charges that this authority is found in the Second War Powers Act, which authorizes the President, among other things, to allocate and control the distribution of materials, etc., for war purposes, and in the First War Powers Act, which authorizes the President to redistribute the functions of the various executive agencies.

However, the War Powers Acts were both temporary measures which are, by their own terms, to endure only for the war emergency and Congress retained the power to limit the operation of either of those acts by subsequent legislation enacted after the

immediate stress of the war emergency had terminated. This it did on October 3, 1944, by passing the War Mobilization and Reconversion Act, which expressed a new and different policy of Congress in regard to private peace time enterprise and, by legislative decree, delivered its mandate to all the executive agencies requiring them to "permit the expansion, resumption or initiation of production for non-war use." The words used in the act are mandatory, and do not admit of any misunderstanding. They are used by the Congress, which is the source of power, and are sufficient to nullify any and all executive authority to allocate or control private production which does not interfere with production for war purposes.

This law was followed by the directive of the President in which he abolished the War Production Board and created the Civilian Production Administration to take its place and assume its functions, further providing, in his executive order creating that Administration, that its powers should be used "to further . . . . a maximum peace time production in industry free from war time controls" etc.

This is the document whereby the Civilian Production Administration was brought to life and whereby whatever power and authority it may possess was vested in it. The President, it will be assumed, had no desire to oppose the policy of Congress as enacted in law, and it is apparent from the words used in the executive order referred to that he endeavored to carry that policy into effect when he created the Civilian Production Administration. The

Administration was changed from "War" to "Civilian" in token of the change from war to peace and the direction that it use it powers to stimulate and expand peace time industry free from war time control is incompatable with the exercise of war time control to limit and restrict peace time industry for any purpose whatever, no matter how laudable. Yet that is exactly what the administration has done in issuing VHP-1. It has issued that order in the attempted exercise of a war time power and in defiance of the will of Congress and of the President.

Schechter v. United States, 295 U. S. 495, 79 L. Ed. 1570:

> "The Constitution provides that 'all legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and a House of Representatives,' Art. 1, Sec. 1. And the Congress is authorized to 'make all laws which shall be necessary and proper for carrying into execution' its general power. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

If this be true no executive agency may function in defiance of the will of Congress as expressed in law. Nor may it make rules creating new and unknown crimes unless in pursuance of plain authority, directly conferred, and consistently with and in furtherance of the will of Congress.

POWER OF EXECUTIVES AND EXECUTIVE AGENCIES TO ISSUE RULES, REGULATIONS AND DIRECTIVES ARE DERIVED FROM CONGRESSIONAL AUTHORITY AND MUST BE EXERCISED IN STRICT CONFORMITY THERETO.

No administrative agency has power to enact a criminal statute, or any rule or regulation making an act a crime except to the extent authorized by Congressional action.

United States v. Eaton, 144 U. S. 677, 36 L. Ed. 591 at 594, speaking of the rule above stated, the Court says:

> "Much more does this principle apply to a case where it is sought, substantially, to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal prosecution is an act committed or omitted in violation of a public law either forbidding or commanding it."

The Court then declares that regulations prescribed by the President or the heads of departments under authority of Congress may have the force of law;

> "but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do that thing a criminal offense in a citizen, when a statute does not distinctly make the neglect in question a criminal offense."

In the case at bar not only is there no Congressional authority for the criminal prosecution of the defendants in this case but they are, in fact, prosecuted in defiance of the will of Congress as expressed in law.

It is fundamental that adminsitrative power to

make and enforce regulations must be exercised in subordination to the acts of Congress and within the framework of the law which confers authority to make them.

Schechter v. United States, 295 U. S. 495, 79 L. Ed. 1570;
Panama Refining v. Ryan, 293 U. S. 388, 79 L. Ed. 446.

The cases above cited were decided by the "old" Court. But the same conclusion is reached in decisions by the "new" Court. See

Yakus v. United States, 321 U. S. 414, 88 L. Ed. 834.

The case last cited recognizes the rule that Congress cannot delegate its law-making power; that Congress had constitutional authority to prescribe commodity prices as a "war emergency measure;" and that the act under consideration in that case was adopted as "a temporary war time measure." Constitutionality of the act was upheld on the grounds stated and because, further, it did not constitute an attempt to delegate the law-making power of Congress but properly declared the policy and purpose of Congress so that the administrative agencies could function within the framework of the law. The Court says:

> "The act is thus an exercise by Congress of its legislative powers. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the

> administrative determination of both the occasions for the exercise of the price fixing power, and the particular prices to be established."

Because the law did these things the acts of the administrative agencies created to carry it into effect were held valid. But these things must affirmatively appear in order to justify the exercise of administrative power. The law must be enacted; it must declare a policy in definite terms; it must provide a method for the enforcement of the declared policy; and lay down the standards which guide the agencies which administer the law.

Unless these conditions are met then the law is not valid because Congress has merely attempted to delegate a power instead of enacting a law. These rules are too fundamental to require discussion.

Yet, in the instant case, the Civilian Production Administration does not act in accordance with the policy of Congress, nor does its action conform to the limitations which were prescribed by the executive order of the President which created it. It has assumed a power altogether greater and more arbitrary than any which it is authorized to administer and seeks to function, not within the framework of the law creating it, but entirely outside the framework of that law.

Voluminous argument could not make the situation any more clear nor would it add anything to the obvious considerations which show the VHP-1 order to be null and void.

It is significant that within two months after VHP-1 order was issued Congress passed the Veter-

ans' Emergency Housing Act of 1946, which covered the whole field of this particular subject. Why should it have passed that act if an executive agency was already empowered to issue rules and regulations which had all the force of law? And, is it not odd that Congress, in enacting that act, failed to denounce as a crime the very course of conduct which has caused these defendants to be prosecuted in this action? Appellants here complain that they are convicted of a crime which was created, out of thin air, by an administration which had no power in the premises, and for the commission of acts which Congress, in legislation covering the whole subject matter, does not make criminal.

THE WAR TIME POWERS OF THE UNITED STATES CANNOT BE USED TO CONTROL A PEACE TIME EMERGENCY WHICH MAY ARISE AFTER THE CESSATION OF HOSTILITIES.

The war time powers of the governement are very great and are necessarily extremely arbitrary in character. Many of them are almost dictatorial in extent. It is obvious that if such powers were permitted to continue indefinitely after the cessation of hostilities, many of the constitutional guaranties would be nullified. In practical effect the unlimited continuance of war time powers would deprive this government of its character as a republic and give it many of the attributes of an absolute monarchy, in which the housing, food and freedom of action of every citizen would be subject to the control of federal executives.

Accordingly, it has been held that there must be some sort of limitation upon the continued exercise of war powers after the cessation of hostilities. That limitation was fixed by certain decisions rendered after the first world war in cases where it was sought to revive the war powers of the United States to meet a peace time emergency arising out of the great miners' strike of 1919 with its consequent shortage in the supply of coal.

Newton Coal Co. v. Davis, Director General, etc., 126 At. 192; 281 Pa. 74.

After the first world war was declared against Germany, Congress passed the Fuel and Food Control Act, authorizing the President to appoint an administrator with power to control and fix prices of food and fuel. This administrator issued many orders in execution of these powers, and, among others, issued orders fixing the price of coal and regulating its use.

After the armistice and before the treaty of peace was signed, in January, 1919, the President suspended the operation of these orders. Some time before October 30, 1919, a nation-wide coal strike was threatened, and, on that day, the President issued a new order restoring all the former regulations which fixed the price of coal and regulated its use and directed that the orders should be executed by the Director General of Railroads.

Under this authority the Director General of Railroads seized large quantities of coal which he paid for at the prices fixed in the various price fixing orders. The suit was brought by the owner of some

of the coal seized to recover the difference between the amount paid to it by the Director General and the reasonable market value of the coal. The Director General defended on several grounds, one of which was that he was justified in making the seizure under the "implied war power" conferred upon him by the acts and orders above mentioned. The Supreme Court of Pennsylvania says: (p. 194)

> "The right was based on what has been generally termed implied war power. The exercise of this right or power has as its foundation the national security and defense; it is of such paramount importance alike to the country and its citizens, and of such drastic consequence, it seems imperative it must not be carried beyond what is generally comprehended by the term, or into conditions of life not justifying its existence. When lawfully brought into action by Congress, it must be kept within its own limitations. It should not exist after the circumstances are ended through which it was brought into life, namely, war or insurrection actually existing. Until the Supreme Court of the United States determines otherwise, the act in question must be held ineffective, after the cessation of hostilities in the broadest sense, freed from technical construction by acts of Congress, having a tendency to continue, on paper only, hostile conditions into a time of peace. With no reason of national import to justify its exercise, and without constitutional authority to sustain it, courts will not uphold acts done either under an abortive power or one equally as bad—a power once good, but inert through its own limitation.
>
> "The reason is obvious. To hold otherwise the supreme sovereign at any time may enter and dictate the most ordinary affairs of life, as may an absolute monarch. Up to the present, at least, the toleration of this in peace time is unthink-

able under our system of government. We do not assert that even when peace prevails, as contrasted with a state of war, domestic conditions may not assume such serious import as to be akin to an insurrection, though force of arms be not used; when such condition arises Congress should publicly declare it; executive officers should not be forced to use legislation intended for other purposes to justify their acts. *Apportionment of commodities* or diversion of fuel *stands in the same position in this respect as fixing prices.*"

* * * *

"But it is equally clear, when circumstances which gave rise to the power no longer exist, or where the executive acts outside the scope of his authority, the rights of citizens must depend on things as they are, and not on the protestations of executive officers. *Yick Wo. v. Hopkins*, 100 U. S. 356, 373, 30 L. Ed. 220; *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 667. Even the 'war power' of Congress is subject to applicable constitutional limitations, *Hamilton v. Kentucky*, 251 U. S. 146, 64 L. Ed. 194.

"It has been held that, in war time, the courts will not accept the conclusion of military authorities, duly approved by the President, as to military necessity for exercising war powers, *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281. And, if this is still the law, it would seem acts done a year or so after the close of hostilities, *before* peace is actually signed, would scarcely be considered a military necessity, unless it was plainly apparent that they were a direct result of such necessity." (Emphasis added.)

The Court concludes (p. 195):

"The restoration order of October 30 was not a war measure under the act and consequently must be held to be invalid. The purpose for which the act was passed no longer existed and an order based on the 'present emergency,' the

> anticipation of a coal strike, could hardly be considered as being related to the 'efficient prosecution of the war.' Nor could any statement make it so even if one had been made."

The reasoning of the decision is so evidently sound that further argument in the attempt to support it is unnecessary.

The case was taken to the United States Supreme Court and was there affirmed. See

Davis, Director General v. Newton Coal Co., 267 U. S. 292; 69 L. Ed. 617.

Another case arising under an almost exactly similar state of facts was decided by the Supreme Court of Massachusetts. See

Hood v. Davis, Director General, 151 N. E. 119, 255 Mass. 200.

Referring to the decision in *Newton Coal v. Davis*, the Court declares, (p. 122), in reference to the defendant's claim that the question of war powers and their limitations were not considered in the *Newton* cases:

> "A careful study of the case as it is reported in 126 A. 192, 281 Pa. 74, and the briefs of counsel, and of the same case with briefs of counsel as reported in 276 U. S. 292, 69 L. Ed. 617, makes it impossible to assume that the Supreme Court at Washington did not consider the rules and regulations of the Fuel Administrator above quoted and relied on by the defendant."

And the Massachusetts Supreme Court followed the decisions in the *Newton* case.

It is obvious that the "First War Powers Act" and

the "Second War Powers Act" are strictly limited to the exercise of war powers. They cannot be carried over into times of peace to justify an attempt to control a purely peace time emergency which arises after the cessation of hostilities, such as the erection of buildings by private citizens.

A very similar proposition was considered by Judge Claude McColloch in the case of *Paul A. Porter, Administrator Office of Price Administration, plaintiff v. Gertrude C. Wilson, defendant,* No. 3393, District Court of the United States, for the District of Oregon, in a decision rendered on January 25, 1947. In dismissing that prosecution, the Judge stated:

> "Since December 12, 1946, when President Truman appointed General Fleming, the courts have temperately withheld judgment, waiting for Congress and the legislatures to convene so that they could deal with the clouded rent situation.
>
> "General Fleming's appointment is said to be authorized by the First War Powers Act which provides 'for the national security and defense, for the successful prosecution of the war, for the support and maintenance of the Army and Navy, for the better utilization of resources and industries, and for the more effective exercise and more efficient administration by the President of his powers as Commander in Chief of the Army and Navy, the President is hereby authorized to make such redistribution of functions among executive agencies as he may deem necessary . . . .'
>
> "But the act also provides 'that the authority by this title granted shall be exercised only in matters relating to the conduct of the present war.'

> "The courts should not be expected longer to uphold the fiction that a war is being conducted when, in fact, there is no war."

The rule that war powers should not be utilized to control peace time emergencies arising after the cessation of hostilities is necessary to the preservation of constitutional rights. There is no better way of suspending the operation of the Constitution than to continue the exercise of war powers indefinitely after war has ended. The formal execution of treaties of peace is generally delayed until a period of years after the war is over, and that period might be extended for five, ten or even twenty years after war has ceased to be an actuality. Is the civilian population to be subject to Federal war powers during the whole period of such delay? If so, then the Constitution may be effectively repealed by the simple expedient of delaying the treaty of peace until a Federal dictatorship is actually established, and precedents thoughtlessly created now may, at some future date, be used to further an attempt to destroy our system of Constitutional government.

THE DEFENDANTS ARE NOT CHARGED WITH ANY ACT IN VIOLATION OF VHP-1 ORDER.

The information charges, (Count 2, R. 5), that defendants, "on and after May 1, 1946, without authorization of the Civilian Production Administration, wilfully did carry on and participate in the construction of commercial buildings, to contain a cocktail lounge, bar, gambling casino, storage room, office,

rest rooms and living quarters for employees . . . . and that the cost of said commerical buildings was approximately $40,405.18 the same being new construction of the type prohibited by said order VHP-1 and was approximately $39,405.18 in excess of the $1,000.00 exemption provided by paragraph (d) (1) (iii) of said order."

The allegation that the cost of the building was $39,405.18 in excess of the allowed exemption is a pure conclusion of law.

VHP-1 order provides : (d)

> "This order does not restrict a construction, repair, alteration or installation job, the cost of which does not exceed the allowance given below for the particular kind of structure involved:
>
> * * * *
>
> "(vi) $15,000.00 for . . . a structure used for or in connection with a railroad or street railway or *a commercial airport,*" etc.
>
> * * * *
>
> "(4) If a structure is used for more than one purpose . . . . the use to which the greatest part of the structure will be put (computed on the basis of floor area where applicable) determines the allowance."

The building erected by defendants was for the Tahoe Sky Harbor Airport, and was used almost entirely as an airport administration building.

Many items of construction are exempt from the operation of the order and we quote a few of such exemptions.

> "(2) For the purpose of determining whether a particular job is exempted from this order by paragraph (d), the 'cost' of a job means the cost of the entire construction job *as estimated at the*

time of beginning construction. This includes the cost of paid labor engaged in the construction work, regardless of who pays for it, the cost or value of new fixtures, mechanical equipment and materials incorporated in the structure whether or not obtained without paying for them, and the amount paid for contractors fees. *It does not include the cost or value of previously used fixtures, mechanical equipment and materials, the value of unpaid labor*, or the cost or value of machinery and equipment (other than mechanical equipment) or the cost of labor engaged in assembling and installing the machinery and equipment."

Supplement 2 to VHP-1 order provides:

"(c) (1) The following kinds of work do not constitute beginning construction on a proposed structure and the cost of such work need not be included in computing the cost of a job under paragraph (d) (2) of VHP-1 to determine whether the job comes within the applicable allowance under paragraph (d) (1) of the order.

"Site preparation such as excavating, grading, filling with dirt, gravel or crushed stone . . . .

"Erecting fences, work sheds and construction shanties. Laying pipes, conduits and wires outside the boundary lines of the walls of the structure. Building retaining walls not physically incorporated within the structure. . . .

"Constructing or erecting forms for concrete."

The mere charge that defendants carried on and participated in the construction of a building which cost $40,405.18 falls far short of a showing that they violated the terms of VHP-1. A proper charge would allege the cost of construction "as *estimated* at the time of beginning construction." It should allege facts which show within what classification the build-

ing falls so that the amount of the allowable exemption could be fixed on the basis of the alleged facts and not as a mere conclusion of law. The charge should show that the construction cost as alleged in the information was not made up of and did not include any of those items which VHP-1 order excludes from its prohibitions.

The use of "previously used" (or second hand) fixtures, mechanical equipment and materials, and the "value of unpaid labor" might easily and of themselves alone, make up ninety per cent of the cost of construction of the building. But, in addition, numerous other items, notably the preparation of the site, are excluded from the cost of work prohibited by the order.

Count 2 of the information is fatally defective in still another particular.

It is important to note that VHP-1 merely forbids the "beginning of construction" after March 26, 1946, the effective date of that order. If construction work is commenced *before* March 26, 1946, it may be continued to completion after that date without violating VHP-1. This appears clearly from the terms of the order.

Sec. (c) (2) of the order provides:

> "This order forbids the beginning of certain kinds of work. To 'begin' work on a structure means to incorporate into a structure on the site materials which are to be an integral part of the structure in question. . . . . The order does *not* apply to work which was begun before March 26, 1946, and which was being carried on on that

date and which is being carried on normally after that date. However this rule only applies to the particular building or other structure begun before March 26, 1946."

A charge such as that here made, that the defendants, "on and after May 1, 1946" carried on and participated in the construction of a building, does not either directly or by implication charge that such building was not in course of construction on March 26, 1946. And if, construction work on the building were begun before March 26, 1946, and carried on normally thereafter, there is no violation of VHP-1. the information in the case at bar is fatally defective in failing to allege this fact and does not charge a criminal offense against the defendants.

THE OMISSION FROM THE INFORMATION OF THE ALLEGATION OF A MATERIAL FACT CANNOT BE SUPPLIED BY INFERENCE, INTENDMENT OR IMPLICATION.

Neither the testimony nor any other portion of the record may be resorted to in order to supply a necessary allegation which is omitted from the information.

Fontana v. United States, 262 Fed. 283.

A sufficient charge of crime is necessary to sustain the jurisdiction of the District Court to render a judgment of conviction.

Albrecht v. United States, 272 U. S. 1, 71 L. Ed. 505-9.

Where the allegation of a material fact does not appear in the charge, the omission cannot be supplied by recital, inference, intendment or implication.

Danaher v. United States, 39 Fed. (2) 325.

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced within the definition of the offense must be stated and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital."

United States v. Hess, 124 U. S. 486;

Pettibone v. United States, 148 U. S. 197, 37 L. Ed. 419-423.

CONCLUSION.

The Federal government is a republic and one possessing limited and restricted powers. It cannot, in times of peace, under the Constitution, control the ordinary business activities of a citizen conducted entirely within the confines of one of the sovereign states. When hostilities have ceased and peace has again blessed the land it is time that the Federal government abandon the arbitrary and dictatorial powers of war and recognize the guaranties of the bill of rights.

This is especially true as to the bureaus, departments and administrations which, greedy for power and prestige, seek to perpetuate and extend their perogatives so as to control every social and business activity of the citizen. In times of peace the citizen

should again have the rights which are guaranteed to him by the Constitution and be permitted to conduct his private business within the confines of one of the states of the Union free from the interference of bureaucrats and administrative agents. And when such executive officers seek to act in excess of the powers conferred upon them by the President of the United States, and in defiance of the policies of Congress as expressed in the laws of the United States which it enacts, there should be no difficulty in finding that their acts are nugatory and void.

We respectfully submit that the defendants in this case did not commit a crime and that the judgment of conviction rendered against them should be reversed.

Respectfully submitted,

BOCCARDO & WILLIAMS,

By JAMES F. BOCCARDO

Attorneys for Appellants.

APPENDIX

APPENDIX

EXCERPTS FROM VETERANS EMERGENCY HOUSING ACT OF 1946.

"The Veterans Emergency Housing Act of 1946, May 22nd, 1946, C. 268, 60 Stat. 207, 50 U. S. C. A. App. Sections 1822 to 1833."

Section 1824—Establishment of material priorities; order of priorities; defense priorities unaffected.

"(a) Whenever in the judgment of the Expediter there is a shortage in the supply of any materials or of any facilities suitable for the construction and | or completion of housing accomodations in rural and urban areas, and for the construction and repair of essential farm buildings, he may by regulation or order allocate, or establish priorities for the delivery of, such material or facilities in such manner, upon such conditions, and to such extent as he deems necessary and appropriate in the public interest and to effectuate the purposes of this Act (Sections 1821-1833 of this Appendix).

"(b) In issuing any regulation or order allocating or establishing priorities for the delivery of any materials or facilities under this section, the Expediter shall give special consideration to (1) satisfying the housing requirements of veterans of World War II and their immediate families, (2) the need for the construction and repair of essential farm buildings, and (3) the general need for housing accomodations for sale or rent at moderate prices. In order to assure preference or priority of opportunity

to such veterans or their families, the Expediter shall require that no housing assisted by allocations or priorities under this section shall be sold within 60 days after completion or rented within 30 days after completion for occupancy by persons other than such veterans or their families; PROVIDED, that the Expediter by appropriate regulation may allow for hardship cases.

"(c) The provisions of this section shall not be construed as in any way affecting the power of the President to assign priorities or to allocate any materials or facilities under the provisions of subsection (a) of Section 2 of the Act of June 28, 1940, entitled 'An Act to expedite national defense, and for other purposes' (Section 1152 of this Appendix), as amended."

Section 1827—Injunction; penalties; jurisdiction; civil action.

"(b) Any person who wilfully violates any provision of Section 5 of this Act (said Section 1825), and any person who knowingly makes any statement false in any material respect in any description or statement required to be filed under Section 3 (Section 1823 of this Appendix), shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than one year, or to both such fine and imprisonment. Whenever the Expediter has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought."